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IN THE

Supreme Court of the United States

October Term, 1980

No. 80-1257

DONALD SCHRIVER, INC., SULLIVAN-KELLEY & ASSOCIATES, *et al.*,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT UNIONS IN OPPOSITION

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A. The petitioners provide no support for their assertion that the questions they present are substantial. Indeed, not one member of the court below or of the National Labor Relations Board (all of whom participated) have accepted any of petitioners' contentions. Instead all have concluded that petitioners' claims are belied by the language of the applicable statutory provisions read in light of their history and purpose and that those claims are not supported by judicial precedent. And while petitioners adopt the desperate expedient of relying on a panel decision in the Ninth Circuit (*Pacific Northwest Chapter, etc.* v. *NLRB*, 609 F.2d 1341 (C.A. 9)) to create the illusion of a conflict in the Circuits (Pet. 44-46)[1] that panel decision has now been sub-

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[1] "Pet." refers to the Petition for Certiorari. "Pet. App." refers to the Appendix for the Petition for Certiorari.

jected to rehearing *en banc*. Thus the true lesson of the Ninth Circuit proceedings is that this request for review is at best premature. The petition should therefore be denied.

B. The 8 questions presented in the petition raise two issues. Questions 1-5 concern the scope of §8 (e) of the National Labor Relations Act, as amended, (the "hot cargo" prohibition), and that section's construction industry exemption, read in light of *Connell Co.* v. *Plumbers and Steamfitters*, 421 U.S. 616. Questions 6-8 concern also the relationship between § 8(e) and § 8(f) (which permits prehire agreements in the construction industry) read in light of both *Connell* and *NLRB* v. *Iron Workers*, 434 U.S. 335. In the balance of this memorandum we briefly address each set of questions.

1. *The § 8(e) issue.* The complete rejection of petitioners' § 8(e) contentions resulted from a scrupulous review of the legislative materials and of this Court's *Connell* decision. The plain language of the § 8(e) proviso certainly includes the subcontracting clause at issue here: "*Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work." And the Court of Appeals captured the essence of the underlying legislative materials with admirable lucidity:

> "The [1959] Conference Report [in] briefly describ-[ing] the purpose of the construction industry proviso to § 8(e) * * * states:
>
> > 'The committee of conference does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project or to remove the limitations which the present law imposes with respect to such agree-

ments. Picketing to enforce such contracts would be illegal under the *Sand Door* case (*Local 1796* [sic], *United Brotherhood of Carpenters* v. *NLRB*, 357 U.S. 93 (1958)). To the extent that such agreements are legal today under section 8(b)(4) of the National Labor Relations Act, as amended, *the proviso would prevent such legality from being affected by section 8(e).'*

"Remarks by Senator Kennedy, * * *, make clear that Congress believed that subcontracting agreements were lawful in the construction industry prior to 1959:

> 'Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e). The proviso is also applicable to all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them.'

105 CONG. REC. at 17900; II LEGISLATIVE HISTORY at 1433.

"The employers in this action have not cited a single case in which a subcontracting agreement was found to be unlawful prior to 1959 by reason of the fact that the agreement was not limited to particular jobsites at which signatory union workers were employed. There is absolutely no evidence that such agreements were prohibited prior to 1959, and the legislative history makes clear that if an agreement was lawful in 1959, the construction industry proviso 'would prevent such legality from being affected by section 8(e).' Conference Report, *supra*, at 39; I LEGISLATIVE HISTORY at 943.

"On the other hand, there is evidence that the pattern of collective bargaining in the construction industry in 1959 included subcontracting agreements such as those present in this case. Perhaps most influential is a report published in 1961, containing the results of a study which examined 'the prevalence and characteristics of subcontracting provisions in major collective bargaining agreements in effect in 1959, prior to the

Taft-Hartley amendments contained in the Labor-Management Reporting and Disclosure Act of 1959.' Lunden, *Subcontracting Clauses in Major Contracts*, 84 MONTHLY LABOR REVIEW 579 (part I), 715 (part II), at 579 (1961).

"After describing the prevalence of subcontracting agreements in the construction industry, the study noted:

> 'The single most frequent requirement, found in more than 50 major contracts, called for the subcontractor to comply with all the terms and conditions of the prime employer's agreement. This provision "blankets in" the subcontractor, no matter what project he works on in the local union's jurisdiction or which employer he works for.'

Id. at 715." [Pet. App. 39a-42a, footnote omitted, emphasis in original.]

It follows, as the Court of Appeals concluded:

"As developed above, the subcontracting agreements in the present case are consistent with the patterns of collective bargaining in the construction industry existing at the time of the 1959 amendments to the NLRA. In contrast, the subcontracting agreement sought in *Connell* was 'a relatively novel organizing tactic in the building trades.' St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603, 628 (1976). • • •

"In addition to the lack of evidence showing that the subcontracting provision in *Connell* was consistent with the pattern of bargaining in the industry, the Supreme Court in *Connell* was also faced with a union tactic that effectively avoided certain of the clear proscriptions of § 8(b)(4) and § 8(b)(7). Thus, the Court in *Connell* did not feel bound by the literal language of § 8(e) and, instead, imposed a limitation not expressly included in the statute in order to enforce a clear congressional mandate to restrict 'topdown' organizing. 421 U.S. at 628, 633.

"In the present case, the 'glaring loophole' found in *Connell* does not exist: no congressional purpose is un-

> dermined by the union conduct at issue. Instead, the agreements sought are fully consistent with the declared legislative purpose of maintaining the pattern of collective bargaining as it existed in the construction industry prior to 1959. In such a situation, we believe that it is not the province of this court to ignore the literal wording of the statute and impose a significant limitation that is not expressly included in the statute. Any further modification of the statute must come from Congress." [Pet. App. 48a-49a.]

The petition fails to demonstrate any error in the foregoing.

2. *The § 8(f) Issue.* Petitioners do not confine themselves to reading far more into the *Connell* case than was there decided. They likewise seek to expand this Court's decision in *NLRB* v. *Iron Workers*, 434 U.S. 335, which construed § 8(f) of the 1959 amendments to the Act, and seek support in that decision for their basic contention that the Board and the Court of Appeals erred insofar as they held that the respondent unions did not violate § 8(e) or § 8(b)(4)(A) in seeking the subcontracting clauses whose legality is at issue in this proceeding. But this further effort to contrive a conflict with the decisions of this Court is likewise wholly baseless. Indeed, in sustaining the decision of the NLRB, the *Iron Workers* Court acknowledged that the Board's view was not the only possible interpretation of § 8(f), but "represents a defensible construction of the statute and is entitled to considerable deference" (434 U.S. at 350). Petitioners' argument does not explain why the Board's unanimous interpretation of the same provision here is entitled to any less deference.

It is well at the outset to compare this case with what was at issue in *Iron Workers*. The Board had there held that the union, by picketing an employer for more than thirty days (without filing a representation petition) in order to compel him to enter into a § 8(f) agreement, had violated § 8(b)(7)(C). In contrast, no violation of § 8(b)(7)

was charged in the present case and the petition itself acknowledges that "section [8(b(7)] is irrelevant to the scope of the construction industry proviso to Section 8(e)." (Pet. 32.)

What petitioners do argue is that the Court's interpretation of § 8(f) in *Iron Workers* establishes that a pre-hire agreement does not create a collective bargaining relationship. But while the Court there held that unless the union obtains a majority, a § 8(f) agreement is not enforceable against the employer's will under § 8(a)(5) (*id.* at 345-346), and perhaps not under § 301(a) either (*id.* at 351-352),[2] there was no suggestion that such an agreement does not create a collective bargaining relationship. Indeed, in general labor law terms that is its very vice. See *Garment Workers* v. *Labor Board*, 366 U.S. 731. For as the *Iron Workers* Court also observed, "Section 8(f) is an exception to [the] rule" (*id.* at 345) that an employer and a union violate §§ 8(a) and (b) of the Act by entering into an agreement which grants the union exclusive recognition although it represents less than a majority of the employees. Thus, outside the construction industry, while such an agreement is illegal, it nonetheless creates a "a collective-bargaining relationship." It follows that the same result obtains within the construction industry where such agreements are lawful. Indeed, the *Iron Workers* opinion itself refers to a § 8(f) agreement (whether or not with a majority representative) as "a collective-bargaining contract" (*id.* at 345). Thus, even on a purely verbal level, *Iron Workers* lends no support to petitioner's reading of § 8(f).

But there is a more fundamental reason why the petition's reliance on § 8(f) and its interpretation in *Iron Workers* adds nothing to its argument on the scope of the

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[2] We read the Court's opinion as not deciding the § 301(a) issue, but only as rejecting the contention that a holding of unenforceability under § 301(a) would be inconsistent with *Retail Clerks* v. *Lion Dry Goods*, 369 U.S. 17.

subcontracting proviso to § 8(e). For the question as to what is a "collective-bargaining relationship" for purposes of the *Connell* rule that the subcontracting proviso "extends only to agreements in the context of collective-bargaining relationships" (421 U.S. 633) is to be answered by reading not *Iron Workers,* but *Connell* itself.[3] *Connell* shows that in determining that Local 100 was not seeking a "collective-bargaining relationship" the critical factor was "the fact that Local 100 had no interest in representing Connell's employees" (*id.* at 626, see also *id.* at 619). And in stating the issue as to the scope of the proviso the *Connell* opinion contrasts a collective bargaining relationship with an agreement between a union and "a 'stranger' contractor" (*id.* at 627). Not even petitioners argue that the unions and the employers from whom they sought the subcontracting agreements were "strangers" in that sense. For these reasons, and others which it stated, the court below was clearly right in concluding that the limitations which *Iron Workers* found in § 8(f) "are irrelevant to our conclusion * * * that a subcontracting provision sought in the context of an 8(f) prehire agreement occurs 'in the context of collective-bargaining' as required by *Connell.*" (Pet. 33-a.)[4]

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[3] Petitioners' entire argument on § 8(f) in general, and on *Iron Workers* in particular, repeats the analytical error long ago exposed by Professor Cook:

> The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has, and should have precisely the same scope in all of them runs all through legal discussions. It has the tenacity of original sin and must constantly be guarded against. [Cook, the Logical and Legal Bases of the Conflict of Laws, 150, quoted with approval in *Civil Aero. Bd.* v. *Delta Air Lines,* 367 U.S. 316, 328.]

[4] Petitioners' abuse of precedent is further illustrated by their reliance on Judge Learned Hand's opinion in *Douds* v. *Local 1250,*

CONCLUSION

For the foregoing reasons and those stated in the Brief in Opposition of the National Labor Relations Board the Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

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Retail Store Union, 173 F.2d, 764, 769 (.A.2, 1949). (Pet. 37). That case obviously decided nothing about § 8(f) which did not come into the Act until ten years later. In fact, the *Local 1250* case involved the proviso to § 9(a) which permits an employee to present a grievance individually to an employer (if the employer wishes to hear him, and if the statutory representative is given the opportunity to be present). See *Emporium Capwell Co.* v. *Community Org.*, 420 U.S. 50, 61, n. 12. The proposition Judge Hand decided was that in thus presenting a grievance, the employee may do so through a union other than the statutory representative.

Actually, Judge Hand's approach to statutory interpretation in *Local 1250* was the precise opposite of that which petitioners urge on this Court. In the sentence immediately following that from which petitioners quote (so selectively that the context is destroyed) Judge Hand wrote: "The Act says nothing on the subject; if it bans a union, it is by implication, and we can see no basis for such an implication" (173 F.2d at 769). That sentence states the approach followed by the Board and the Court below with respect to §§ 8(e) and 8(f) and further supports the correctness of their conclusion. Petitioners, by contrast, would have this Court *diminish* authority which construction unions are expressly granted in the § 8(e) proviso and in § 8(f).